IN THE

Supreme Court of the United States

October Term, 1973
No. 73-786

MAJOR FRED R. ROSS, and
STATE OF NORTH CAROLINA,

Petitioners,

-vs-

CLAUDE FRANKLIN MOFFITT,

Respondent.

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE

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PRELIMINARY STATEMENT

The State of Florida will be referred to herein as Florida.

THE INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE

The issue presented in the case at bar applies to Florida inasmuch as Florida has followed this Honorable Court's decision in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), and thus has only provided counsel to indigent defendants on appeals in criminal cases. Florida gives an appeal to a defendant in a criminal case as a matter of right. Sections 924.05 and 924.06, Florida Statutes, and State ex rel. Seay v. Mayo, 137 Fla. 781, 189 So.2d 26 (1939).

Furthermore, Florida, in keeping with Douglas, supra, does not recognize a constitutional right to counsel of an indigent defendant seeking discretionary review by petition for writ of certiorari. In Hooks v. State, 253 So.2d 424, 426, 427 (Fla. 1971), certiorari denied, 405 U.S. 1044, 31 L.Ed.2d 587, 42 S.Ct. 1330 (1972), the Supreme Court of Florida held:

> "The petitioner has no absolute right to appointed counsel in presenting his petition for certiorari in the case sub judice. The question in each proceeding of this nature before this Court should

be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements. See State v. Weeks, 166 So.2d 892 (Fla.1964), where the Court held that a prisoner had no absolute right to assistance of counsel on an appeal from an adverse ruling on his motion for post-conviction relief, although Fifth Amendment due process would require such assistance if the post-conviction motion presented an apparently substantial, meritorious claim for relief, and if the allowed hearing was potentially so complex as to suggest the need."

* * *

"The questions presented in the petition for writ of certiorari are not so complex as to require the appointment of counsel in order to accomplish a fair and thorough presentation of petitioner's claims to this

> Court. Petitioner's motion for appointment of counsel is denied. . . . ."
> Hooks, supra, pages 426-427. (Emphasis supplied)

Accordingly, it is in the best interest of Florida to appear as amicus curiae in the case at bar in opposition to Respondent Moffitt's position, inasmuch as this single appeal may result in jeopardizing the convictions of all criminal defendants in Florida who have not been provided counsel to seek certiorari from the Florida Supreme Court and this Honorable Court, and in excessively burdening the administration of justice in Florida's appellate courts as well as the work load of those responsible as counsel in certiorari proceedings.

QUESTION PRESENTED

DOES THE FOURTH CIRCUIT COURT OF APPEALS' ORDER, GRANTING AN INDIGENT DEFENDANT THE CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF ASSIGNED COUNSEL IN IN SEEKING FURTHER DISCRETIONARY REVIEW BY WRIT OF CERTIORARI (1) IN THE STATE'S HIGHEST COURT, AND (2) IN THE UNITED STATES SUPREME COURT, CONSTITUTE REVERSIBLE ERROR?

ARGUMENT

The question presented above should be answered in the affirmative under the rules of law and reasons announced in decisions in the United States Courts of Appeals for the Seventh and Tenth Circuits, and this Honorable Court denied certiorari in both cases. Pennington v. Pate, 409 F.2d 757 (7th Cir., 1969), cert.den., 396 U.S. 1042, 24 L.Ed.2d 686, 90 S.Ct. 689 (1970); and Peters v. Cox, 341 F.2d 575 (10th Cir., 1965), cert.den., 382 U.S. 863, 15 L.Ed.2d 101, 86 S.Ct. 126 (1965).

Firstly, as noted in Pennington v. Pate, supra, this Honorable Court in Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963), explicitly refused "to extend the right of counsel to the second appeal stage." Pennington, supra, 409 F.2d at page 760, where the Court noted:

> "We find support for our decision in the present practice of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal

as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (Emphasis supplied)

Cf.: United States v. Nelson, 275 F.Supp. 261, 264 (D.C. Cal., 1967), where the Court stated:

"As far as petitions for certiorari to the United States Supreme Court are concerned, the right to that remedy is provided by federal law (28 U.S.C. §2101(d), and U.S. Supreme Court Rules 19-20) and, as noted by Justice Harlan in his dissent in Douglas v. People of State of California (1963), 372 U.S. 353, at pp. 365-366, 83 S.Ct. 814 at pp. 820-821, 9 L.Ed.2d 811, any constitutional requirement for the appointment of counsel to prepare or prosecute such petitions would seem to rest, not upon the State of California, but upon the United States Supreme Court which has nevertheless, followed the practice of both granting and denying such petitions without

> appointment of counsel, even when presented by defendants who file as indigents (Emphasis supplied) in propria persona (Emphasis supplied by Court)." United States v. Nelson, supra, at page 264.

Secondly, as noted in Pennington, supra, 409 F.2d at page 760:

> "A second reason for not imposing on the Illinois Supreme Court the duty of providing counsel for every petitioner seeking a discretionary appeal is that, if in fact a petitioner, such as Pennington, does have a meritorious constitutional claim which he has heretofore failed to assert, this claim has either been waived and so could not under any circumstances be presented to the Illinois Supreme Court on appeal or it concerns such a fundamental right that an adequate remedy still exists in the form of the Illinois Post-Conviction Hearing Act, Ill.Rev. Stat. ch. 38 § 122-1 et seq. (1967). Concerning the post-conviction hearing procedure, the Illinois Supreme Court has held that a petitioner in such a proceeding is entitled to the assistance of a lawyer in the presentation of his original

> petition or in the preparation of an amended petition if necessary. People v. Wilson, 39 Ill.2d 275, 235 N.E.2d 561 (1968)."
> (Emphasis supplied.)

Florida, likewise, has a procedure for hearing constitutional claims not raised in a direct appeal, which is Rule 3.850, Florida Rules of Criminal Procedure, titled "Post-Conviction Relief." When complex legal issues are presented in a motion for post-conviction relief under Rule 3.850, supra, the trial court to which the motion is presented is authorized to appoint counsel to represent an indigent movant, both at the hearing on the motion and on appeal from an order of denial entered on the motion. State v. Weeks, 166 So.2d 892 (Fla. 1964); Herzig v. State, 200 So.2d 632 (4 DCA Fla., 1967), cert.disch., 208 So.2d 619 (Fla. 1968). As noted in Herzig, supra, 208 So.2d at page 621, the test of deciding whether to appoint counsel is:

> ". . . [W]hether under the circumstances the assistance of counsel is essential to accomplish a fair and thorough presentation of the prisoner's claim."

Cf.: Hooks v. State, supra, at 253 So.2d 426, 427. See also the concurring opinion

in Pennington, supra, 409 F.2d at page 762:

> "My Concurrence in the result is based on my belief that prisoner-petitioners in Illinois are not prejudiced by the failure to supply counsel here due to the existence of Illinois' post-conviction hearing procedures. As noted by the majority it has been held that counsel must be appointed for indigents to aid in the preparation and presentation of their first post-conviction petitions. It is my understanding that the review afforded by this procedure is sufficient to review any significant and meritorious claims of constitutional error in any of the prior proceedings. Until we are shown a case in which this procedure is inadequate or unable to review such constitutional questions which could have been presented in an appeal of right under Rule 317, I will regard the procedure as a sufficient substitute for the appointment of counsel to assist in petitions for review under Rule 317." (Emphasis supplied.)

Thirdly, the nature of certiorari in the Florida Supreme Court is such that it does not issue as a matter of right, but rests in the sound discretion of the Court, and does not serve the purpose of an appeal. Article V, Section 3(b)(3), Florida Constitution; and First National Bank v. Gibbs, 82 So. 618 (1919). In light of these authorities, Florida respectfully urges that certiorari is no part of a direct appeal, and that it should be correctly looked to as a collateral attack on the conviction, similar in substance to a motion under Rule 3.850, supra. However, procedurally certiorari certainly involves the exercise of discretion, which is not permitted under Rule 3.850, supra. It seems clear that a defendant's claims stand a far better chance of being adjudicated under Rule 3.850, supra, than under the discretionary procedures of certiorari in the Supreme Court of Florida.

Nevertheless, the Fifth Circuit Court of Appeals held in Abraham v. Wainwright, 407 F.2d 826, 827 (1969), that an indigent defendant has no constitutional right to counsel in a collateral attack on the conviction. The Court stated at 407 F.2d 827, 828:

> "The sole question certified for appeal is whether the state appellate court erred in denying the appellant's request for appointment of counsel on appeal from denial of his motion to vacate the judgment pursuant to Florida Cr.P. Rule

1.850, 33 F.S.A.

"It is clear to us that there was no violation of appellant's federally protected rights. There is a sharp distinction between the direct appeal from a conviction and a collateral attack on the conviction. An indigent defendant has the constitutional right to counsel on direct appeal, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); there is no such right to counsel in post-conviction proceedings, Stanley v. Wainwright, 5 Cir., 1969, 406 F.2d 8; Fleming v. United States, 5 Cir., 1966, 367 F.2d 555; Ford v. United States, 5 Cir., 1966, 363 F.2d 437; Putt v. United States, 5 Cir., 1966, 363 F.2d 369. This is also the rule in Florida. State v. Herzig, 208 So.2d 619 (Fla. 1968); State v. Weeks, 166 So.2d 892 (Fla. 1964)."
Abraham, supra, pages 827-828. (Emphasis supplied)

The conclusion is inescapable that the discretionary procedures of review by certiorari carry no constitutional right to counsel, inasmuch as the non-discretionary procedure for post-conviction relief under Rule 3.850, supra, creates no absolute right to counsel, as held in

Abraham, supra.

Accordingly, Florida respectfully submits that the decision in Hooks v. State, supra, 253 So.2d 424, 426, 427 (Fla. 1971), cert. den., 405 U.S. 1044, 31 L.Ed.2d 587, 92 S.Ct. 1330 (1972), should be looked to as authoritative with respect to the issue presented in the case at bar, and that the following test relied on in Hooks should be adopted as controlling:

> "The petitioner has no absolute right to appointed counsel in presenting his petition for certiorari in the case sub judice. The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements . . . ." (Emphasis supplied) Hooks, supra, at page 426.

CONCLUSION

Under the authorities reviewed above, and for the foregoing reasons, the question presented herein should be answered in the affirmative, and the decision of the Court of Appeals in the case at bar should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of the State of Florida as Amicus Curiae have been furnished the following:

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